No. 01-1332

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS NATIONAL ASSOCIATION OF BROADCASTERS, ASSOCIATION OF LOCAL TELEVISION STATIONS, INC., THE UNIVISION NETWORK LIMITED PARTNERSHIP, UNIVISION TELEVISION GROUP, INC., THE ASSOCIATION OF PUBLIC TELEVISION STATIONS, THE PUBLIC BROADCASTING SERVICE, AND THE CORPORATION FOR PUBLIC BROADCASTING

THOMAS P. OLSON
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

DONALD B. VERRILLI, JR. *
JESSIE K. LIU
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 663-6000

* *Counsel of Record*

Counsel for Respondents National Association of Broadcasters, Association of Local Television Stations, Inc., The Univision Network Limited Partnership, and Univision Television Group, Inc.

Additional Counsel on inside cover

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

HENRY L. BAUMANN
BENJAMIN F.P. IVINS
NATIONAL ASSOCIATION OF
BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5300

Counsel for Respondents National Association of Broadcasters, Association of Local Television Stations, Inc., The Univision Network Limited Partnership, and Univision Television Group, Inc.

ROBERT A. LONG, JR.
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-6000

Counsel for Respondents the Association of Public Television Stations, the Public Broadcasting Service, and the Corporation for Public Broadcasting

QUESTION PRESENTED

Whether the Satellite Home Viewer Improvement Act, which provides direct broadcast satellite operators with a copyright license to retransmit local television broadcast programming without obtaining permission or paying royalties, violates the First Amendment because the license gives satellite carriers the option of copyright-free carriage only on a market-by-market basis, and not on a station-by-station basis.

RULE 29.6 STATEMENT

The National Association of Broadcasters has no parent corporations, and no publicly held company owns ten percent or more of its stock.

The Association of Local Television Stations has no parent corporations, and no publicly held company owns ten percent or more of its stock.

The Univision Network Limited Partnership's parent corporation is Univision Communications, Inc. No publicly held company, other than Univision Communications, Inc., owns ten percent or more of The Univision Network Limited Partnership's stock.

Univision Television Group, Inc.'s parent corporation is Univision Communications, Inc. No publicly held company, other than Univision Communications, Inc., owns ten percent or more of Univision Television Group, Inc.'s stock.

The Association of Public Television Stations has no parent corporations, and no publicly held company owns ten percent or more of its stock.

The Corporation for Public Broadcasting has no parent corporations, and no publicly held company owns ten percent or more of its stock.

The Public Broadcasting Service has no parent corporations, and no publicly held company owns ten percent of its stock.

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Respondents National Association of Broadcasters, Association of Local Television Stations, Inc., The Univision Network Limited Partnership and Univision Television Group, Inc., the Association of Public Television Stations, the Public Broadcasting Service, and the Corporation for Public Broadcasting respectfully oppose the petition for certiorari.

STATEMENT

The petition for certiorari should be denied. The Fourth Circuit's carefully reasoned decision correctly rejected petitioners' novel and misconceived constitutional challenges to the Satellite Home Viewer Improvement Act ("SHVIA").[1] That decision does not conflict, directly or in principle, with the decision of any other court of appeals or of this Court, and does not present any question of exceptional legal or practical importance warranting review. In particular, there is no merit to the sole argument for review advanced in the petition – namely, the assertion that the Fourth Circuit's ruling contravenes the *Turner* decisions.[2] Far from conflicting with the *Turner* decisions – which upheld the mandatory must-carry requirements of the Cable Television Consumer Protection and Competition Act of 1992 (the

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[1] Pub. L. No. 1006-113, Div. B, 113 Stat. 1536, 1501A-522 *et seq.* (codified in various sections of the Copyright Act and the Communications Act of 1934).

[2] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*").

"Cable Act")[3] against a First Amendment challenge – the Fourth Circuit faithfully followed the specific holdings of those cases in sustaining SHVIA. As the Fourth Circuit recognized, the present case is far easier than *Turner*. The must-carry provisions of the Cable Act generally *require* cable systems to carry all broadcasters that demand carriage. SHVIA, in contrast, gives satellite carriers the *choice* to retransmit all qualified local broadcast stations in any particular geographic market without obtaining copyright permission or paying for the privilege. SHVIA compels no speech, forbids no speech and burdens no speech. It creates a voluntary option that satellite carriers are free to take or leave.

Petitioners' First Amendment claims thus ignore the "basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *National Endowment of the Arts v. Finley*, 524 U.S. 569, 588 (1998) (quoting *Maher v. Roe*, 432 U.S. 464, 475 (1977)). SHVIA is in the latter category. It does not "extinguish[] petitioners' First Amendment right to choose what to say and what to leave unsaid." Pet. at 12 (quotation omitted). To the contrary, SHVIA does not interfere with that right at all. Petitioners have exactly the same right they had before SHVIA to choose "what to say." If what they want to say – *i.e.*, to transmit – happens to be copyrighted programming owned by someone else, petitioners remain free to secure the necessary copyright permissions to transmit that programming. SHVIA gives petitioners the additional option of carrying all the local television broadcast stations in a

[3] Pub. L. No. 102-385, 106 Stat. 1460.

particular market without securing permission or paying royalties. If petitioners do not want that option, they can decline it and thereby "leave unsaid" all they want to leave unsaid. What petitioners want is a "freedom" they never had before SHVIA. They seek to use the First Amendment to rewrite SHVIA to grant them a compulsory copyright license far more expansive and advantageous than the license Congress chose to confer. They seek, in other words, an utterly unprecedented First Amendment right to exploit for their own purposes broadcast programming owned by others pursuant to indisputably valid copyrights. Viewed in this light, petitioners' challenge to SHVIA is insubstantial, and does not remotely warrant review.[4]

A. Background

This case arises in the context of a complex and dynamic interaction among the three principal means of distributing video programming – over-the-air broadcasting, cable, and satellite. A proper understanding of SHVIA requires an appreciation of that context, which the petition for certiorari largely omits. Indeed, whereas petitioners seek to convey the

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[4] This case raises no issue related to the issues on which review was granted in *Eldred v. Ashcroft*, 239 F.3d 372 (D.C. Cir. 2001), *cert. granted*, 122 S. Ct. 1170 (2002). Although petitioners made a cursory argument in the Fourth Circuit that the market-by-market compulsory license afforded by SHVIA exceeds Congress's powers under the Copyright Clause, the petition for certiorari does not raise that issue, and rests exclusively on First Amendment grounds. In any event, the present case differs fundamentally from *Eldred* because petitioners here have never raised a challenge of any kind to the validity of the underlying copyright in broadcast programming. Rather, petitioners challenge the scope of the compulsory license given them to use broadcast programming notwithstanding the valid copyrights in that programming.

impression that SHVIA was an unwanted burden imposed on them by Congress in order to benefit local broadcasters, the reality is that Congress enacted SHVIA at petitioners' behest (granting them a sweeping compulsory copyright license to use broadcast programming belonging to others) in order to improve petitioners' competitive prospects. And SHVIA has had precisely that effect. In the years since its passage, petitioners' market share has expanded by millions of households, largely because of the very copyright license petitioners attack in this case. Petitioners' constitutional challenge is nothing more than an effort to change the copyright terms Congress has offered in SHVIA to make them even more commercially advantageous to satellite carriers, at the expense of the competing interests of broadcasters, cable operators and the viewing public, which Congress also sought to accommodate.

Over-the-Air Broadcasting. For several decades after the advent of television, most Americans relied on over-the-air broadcasting to receive video programming. "Broadcast stations radiate electromagnetic signals from a central transmitting antenna. These signals can be captured, in turn, by any television station within the antenna's range." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 627 (1994) ("*Turner I*"). Viewers pay nothing to receive over-the-air television. Commercial stations are supported by advertisers; revenues depend on audience size. Noncommerical stations are supported in large part by viewer contributions. Because it uses electromagnetic spectrum, broadcasting has been regulated by the federal government since 1927. Radio Act of 1927, 44 Stat. 1162; Communications Act of 1934, 48 Stat. 1064. Since 1952, the Federal Communications Commission ("FCC") has maintained an allocation system

that generally ensures that communities have at least one broadcast outlet for local programming and as many diverse programming sources as the broadcast spectrum will permit and economic conditions will sustain. 47 C.F.R. § 73.606; *Logansport Broad. Corp. v. United States*, 210 F.2d 24, 26 (D.C. Cir. 1954). Thus, the FCC licenses stations to serve specific local markets. Although some stations are independent, most are affiliated with either the major networks – CBS, ABC, NBC, and FOX – or emerging networks, such as WB, UPN, Univision, or PAX. Network-affiliate contracts grant affiliates the right to broadcast network programming in their markets. Stations also produce, or acquire rights to transmit, additional programming.

Cable. Cable was the nation's first paid television service. Its initial function was to "bring clear broadcast television signals to remote or mountainous communities. The purpose was not to replace broadcast television but to enhance it." *Turner I*, 512 U.S. at 627. Cable operators are licensed by local governments to serve individual communities. Each licensee's distribution system is local, consisting of a wireline network connecting subscribers to a "head-end" from which programming is transmitted. Cable operators acquire rights to transmit programming, and are supported by subscriber fees as well as by revenues from selling advertising time slots. As cable became more popular, networks such as ESPN and HBO emerged to provide operators with additional programming options. By 1992, cable had replaced over-the-air broadcasting as the principal means by which Americans received video programming, but local broadcast stations (viewed both over-the-air and on

cable systems) remained the most popular programming by a wide margin. *Id.* at 627-28, 634.

As cable became an increasingly powerful competitor of over-the-air broadcasting, it was made subject to a mandatory duty to retransmit local television stations. Originally mandated by the FCC, this "must-carry" obligation was codified by Congress in the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 534, 535. In imposing the cable must-carry requirement, Congress sought to preserve "the benefits of free, over-the-air broadcast television" for those who cannot afford paid services and to promote "the widespread dissemination of information from a multiplicity of sources" – policy interests that this Court has deemed to be of the highest national importance. *Turner I*, 512 U.S. at 662.

This Court recognized in *Turner I* that the cable must-carry requirement is critical to the survival of a vibrant over-the-air broadcast system. A station refused carriage on a cable system loses its access to that system's subscribers. Because broadcast advertising revenues are based on the size and demographic composition of the viewing audience, losing cable subscribers as potential viewers is a double blow to broadcasters. It both reduces audience size and siphons off the affluent viewers that comprise the most desirable segments of the audience. Such losses trigger a downward spiral in which lower revenues necessitate the purchase of less expensive programming, which attracts fewer viewers, which in turn further depresses revenues and diminishes audiences. This decline in over-the-air broadcasting is particularly devastating to the millions of Americans –

usually the less wealthy – who depend on broadcasting as their only source of video programming. *Id.* at 663.

Satellite. Satellite systems deliver video programming to subscribers' homes by uplinking signals to orbiting satellites and then beaming those signals from the satellites to the homes of individual subscribers, where they are received by a "dish" connected to each subscriber's television. At its inception in the 1980s, satellite was primarily a rural service that transmitted signals to six- to ten-foot-wide dishes. In the mid-1990s, Direct Broadcast Satellite ("DBS") providers such as EchoStar and DIRECTV, entered the market offering much smaller dishes and catering to urban and suburban subscribers. Like cable operators, satellite carriers acquire the rights to retransmit programming created by others, and are supported by subscriber fees. Historically, satellite television was principally a national service. Orbital satellites could not send signals targeted to particular localities, but instead transmitted signals that covered the entire country.

As the technology and service offerings of DBS improved, satellite and cable increasingly competed for the same customers. Cable, however, had an advantage because it could offer the most popular video programming – local broadcast television stations. In 1976, before most cable networks existed and before it was clear that there would be a substantial market for paid video services, Congress gave cable operators a statutory copyright license to retransmit the signals of over-the-air broadcast stations. 17 U.S.C. § 111(c). Cable operators therefore could transmit local broadcast stations without obtaining copyright permissions or paying royalties. Satellite providers found that the

inability to offer local broadcast stations was a significant competitive disadvantage. Although advances during the 1990s enlarged the technological ability of satellite carriers to provide local broadcast stations to their subscribers, they lacked the legal right to do so because they did not have a compulsory license comparable to the one Congress had given cable.[5] They thus could retransmit local broadcast stations only if they obtained and paid for all the necessary copyright permissions. Satellite carriers believed they needed a statutory copyright license for local broadcast programming in order effectively to compete with cable, and vigorously lobbied Congress to grant them such a license.

B. Satellite Home Viewer Improvement Act

In November 1999, Congress enacted SHVIA, Pub. L. No. 1006-113, Div. B, 113 Stat. 1536, 1501A-522 *et seq.* (codified in various sections of the Copyright Act and the Communications Act of 1934). The statute responded to the satellite carriers' pleas for assistance, but did so in a manner consistent with national communications policy. Section 1002 of SHVIA granted satellite carriers copyright licenses to carry the programming of local television stations without

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[5] Because cable retransmission of distant network stations would threaten the viability of local network stations carrying the same programming, the FCC imposed "network nonduplication" rules that generally prohibit cable systems from retransmitting distant network stations. 47 C.F.R. § 76.92. Therefore, when Congress first considered statutory copyright licenses for satellite carriers, it offered licenses that allowed retransmission of independent stations throughout the country but limited retransmission of major network affiliates to households that could not receive their local affiliate over the air. 17 U.S.C. § 119 (1988).

going through the normal marketplace mechanisms of obtaining permission and paying the copyright holder. Section 1008 of SHVIA established that the licenses were available on a market-by-market basis – and not on a station-by-station basis as the satellite carriers would have preferred. Sections 1002 and 1008 of SHVIA together define the scope of the royalty-free licenses. *See* H.R. Conf. Rep. No. 106-464, at 100 (1999) ("as of January 1, 2002, royalty-free copyright licenses . . . will be available only on a market-by-market basis"). Both sections make clear that retransmitting local broadcast signals without complying with the licenses' terms is not protected and therefore subject to ordinary copyright rules. *Id.* at 94 ("the statutory license overrides the normal copyright scheme only to the extent that carriers strictly comply with the limits Congress has put on that license"). Additionally, Congress carefully tailored the SHVIA carriage provision. Satellite carriers opting to use a license in a particular market were not required to carry broadcast signals that fell below a designated level of quality or that substantially duplicated the programming of other carried signals. 47 U.S.C. § 338(b)-(c). And Congress imposed a "retransmission consent" option analogous to that of the Cable Act. This option allowed individual broadcast stations to decline the prospect of free carriage, and to insist that a satellite carrier provide compensation in exchange for the right to retransmit the station. Any station opting for retransmission consent could not claim any right to be carried pursuant to SHVIA. 47 U.S.C. § 325(b)(4).

Contrary to petitioners' suggestions, SHVIA was not enacted merely "to correct an unfair competitive advantage that cable systems enjoyed over satellite carriers." Pet. at 5. To the contrary, SHVIA reflects a complex and delicate

balance of competing objectives. On the one hand, Congress granted satellite carriers royalty-free copyright licenses to carry local broadcast signals in response to the carriers' claims, during the course of extensive hearings, that such licenses were essential to enable them to compete with cable. At the same time, Congress sought to prevent satellite carriers from gaining unfair competitive advantages. Accordingly, Congress required satellite carriers that availed themselves of the SHIVA license in a particular market to carry all qualified broadcast stations in that market. This provision subjects satellite carriers to a carriage term comparable to that of cable operators. Most importantly, by ensuring that local broadcast stations could continue to reach their full potential audience, SHVIA also protects the fundamental communications policy goal of "preserv[ing] the benefits of free over-the-air local television" for households unable to obtain pay video services and maintaining "the widest possible dissemination of information from diverse and antagonistic sources." *Turner I*, 512 U.S. at 662-63 (quotation marks and citation omitted).

The legislative record amply supported each component of this delicate balance. Representatives from the satellite industry testified that only the ability to carry local stations would enable satellite to compete effectively with cable. *E.g.*, *Reauthorization of the Satellite Home Viewer Act: Hearings Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the House Comm. on Commerce*, 106th Cong. 72 (Feb. 24, 1999) (hereinafter "2/24/99 Hrgs.") (statement of David K. Moskowitz, Senior Vice President and General Counsel, EchoStar) ("[M]ost of the consumers walking out of the store without a satellite dish cite the unavailability of local signals as the reason.");

Copyright Licensing Regimes Covering Retransmission of Broadcast Signals (Part II): Hearings Before the Subcomm. on Courts and Intellectual Property of the House Judiciary Comm., 105th Cong. 4 (Feb. 4, 1998) (hereinafter "2/4/98 Hrgs.") (statement of Charles W. Ergen, President, EchoStar) (testifying that satellite carriers had lost as many as 40 million subscribers as a result of failing to carry local stations); *Video Competition: Multichannel Programming: Hearings on H.R. 2921 and H.R. 3210 Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the House Comm. on Commerce*, 105th Cong. 44 (Apr. 1, 1998) (hereinafter "4/1/98 Hrgs.") (statement of Eddie Hartenstein, President, DirecTV) (testifying that consumers would not pay for cable to obtain local broadcast stations in addition to satellite service).

Congress also received ample evidence that, if given the option, satellite carriers would carry only a handful of stations and exclude many others, resulting in harm to noncarried stations. H.R. Conf. Rep. No. 106-464, at 101. Indeed, EchoStar was already cherry-picking a few stations in each market. 2/4/98 Hrgs. at 77-78 (Appendix One to Statement of James J. Pophan, Vice President and General Counsel, ALTV). Petitioners' complaint in the instant action confirms the accuracy of Congress's predictive judgment, for petitioners expressly alleged that if they were granted station-specific copyright licenses, they would carry only a small fraction of local broadcast television stations.

Congress also knew that in markets where satellite carriers opted not to take advantage of the package license, local television stations would be unaffected, because satellite subscribers would acquire alternative access to the local

stations they watched most of the time. *Copyright Compulsory License Improvement Act: Hearings on H.R. 768 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 106th Cong. 33 (Feb. 25, 1999) (here after "2/25/99 Hrgs.") (statement of David K. Moskowitz, Senior Vice President and General Counsel, EchoStar) (stating that 70% of the time people watch television, they watch local stations). But partial carriage did pose a grave threat: Subscribers who received the most-watched local stations by satellite were unlikely to undertake the trouble and expense of installing rooftop antennas or subscribing to cable to obtain the remaining stations. H.R. Conf. Rep. No. 106-464, at 102. Congress, having learned from its experience with cable, chose not to provide satellite carriers with the means to harm the system of free over-the-air television.

Congress also received substantial evidence – from the satellite carriers themselves – that the carriers would be able, under SHVIA's copyright licenses, to provide local stations to most, if not all, of the country. Petitioner EchoStar testified that, with "spot beam" technology, it could provide local stations to fifty percent of the nation's households from certain orbital slots and could offer "consumers in many smaller markets" local stations from other orbital slots. 2/24/99 Hrgs. at 72-73 (statement of David K. Moskowitz, Senior Vice President and General Counsel, EchoStar); *see also* 2/25/99 Hrgs. at 31 (statement of David K. Moskowitz, Senior Vice President and General Counsel, EchoStar). LTVS, a member of Petitioner SBCA, testified that satellite television also could be delivered from a different spectrum band (Ka-band) than was currently used and that a single orbital slot would provide sufficient capacity to transmit

every standard definition broadcast station in the country. 4/1/98 Hrgs. at 36 (statement of James F. Goodmon, President and Chief Executive Officer, Capitol Broadcasting Company). EchoStar also informed Congress that progress in compression technology represented yet another means of providing more channels of programming from the same spectrum. *Id.* at 130 (statement of Charles W. Ergen, President, EchoStar); *see also* H.R. Rep. No. 106-79, at 14 (1999).[6]

Finally, Congress delayed the effective date of SHVIA's full carriage provision by more than two years in response to the satellite carriers' admonitions that financial considerations militated in favor of providing local stations "a little bit at a time." 2/24/99 Hrgs. at 95 (statement of David K. Moskowitz, Senior Vice President and General Counsel, EchoStar); *see also* 4/1/98 Hrgs. at 111 (statement of Charles W. Ergen, President, EchoStar).

C. Proceedings Below

On September 20, 2000, petitioners brought a suit in the United States District Court for the Eastern District of Virginia alleging that SHVIA violates the Copyright Clause,

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[6] Congress's prediction that the satellite carriers could increase their capacity dramatically was confirmed by Petitioner EchoStar and DirecTV's recent submission to the FCC, as part of their application for approval of their proposed merger, of a plan for full carriage of all stations in the United States. Pet. at 7 n.2 ("After the entry of the decision below, EchoStar and DIRECTV announced that the additional capacity that would be generated if the merger is approved would enable them to offer local-into-local service to all markets nationwide as soon as 2 years later.").

the First Amendment, and the Due Process and Takings Clauses of the Fifth Amendment. Respondents intervened to defend SHVIA, and along with the United States and the FCC, moved to dismiss the complaint for failure to state a claim. On June 19, 2001, the district court granted the motions to dismiss.

The Fourth Circuit affirmed. It first concluded that SHVIA was not subject to strict scrutiny. SHVIA's market-by-market license, the court reasoned, was triggered not by a satellite operator's decision to carry broadcast programming of a particular content, but by the choice to make use of the royalty-free copyright license. Pet. App. 30a. The court also rejected the argument that SHVIA had a content-based purpose because it sought to promote the survival of independent broadcast stations. In the *Turner* decisions, the court noted, this Court had recognized that the cable must-carry rules primarily benefited independent broadcast stations, but nevertheless concluded that the regulations' purpose was content-neutral. Pet. App. 31a-32a.

The Fourth Circuit declined to address the argument that SHVIA should be evaluated under the rational basis standard, because it found that the statute passed constitutional muster under intermediate scrutiny. The court found that the interests that SHVIA was designed to serve were plainly important and unrelated to the suppression of speech and that those interests would be threatened by a copyright license lacking a carry-one, carry-all obligation. Pet. App. 36a-37a. Congress, the court held, reasonably concluded based on substantial evidence that, left to their own devices, satellite operators would carry only the most popular network affiliates, that noncarried stations would

suffer significant economic harm, and that this financial distress would lead to a decline in the quality and diversity of broadcast television programming. Pet. App. 37a-48a. Therefore, the Fourth Circuit concluded, SHVIA comports with the First Amendment.

REASONS FOR DENYING THE PETITION

The petition for certiorari advances no persuasive reason for granting review.

1. There is no conflict between the Fourth Circuit's decision and that of any other Circuit. The few courts that have considered challenges like the one petitioners assert here – which claim a First Amendment right to make free and unrestricted use of copyrighted material owned by others – have rejected them out of hand.

In *CBS Broadcasting, Inc. v. Echostar Communications Corp.*, 265 F.3d 1193 (11th Cir. 2001), *petition for cert. filed*, 70 U.S.L.W. 3626 (U.S. Mar. 28, 2002) (No. 01-1450), for example, the Eleventh Circuit rejected a First Amendment challenge brought by one of the petitioners in this case, EchoStar, to a statutory copyright license that authorized satellite carriers to retransmit distant network signals to persons residing in households that could not receive adequate over-the-air transmission of local signals. *Id.* at 1199. Echostar argued that this provision violated the First Amendment because it did not also grant satellite carriers a copyright license to retransmit distant broadcast signals to households that were adequately served by local over-the-air stations. Rejecting that contention, the Eleventh Circuit held that the challenged provision merely "creates a

narrow exception to the generally applicable, and constitutional, Copyright Act . . . [and] does not threaten . . . free speech rights but actually permits more speech than EchoStar would constitutionally be entitled to under the Copyright Act." *Id.* at 1209.

Similarly, in *United Video, Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir. 1989), the D.C. Circuit rejected a First Amendment challenge to an FCC "syndicated exclusivity" rule allowing the supplier of a syndicated television program to agree with a broadcast television station that the station would be the exclusive presenter of the program in its local broadcast area. *Id.* at 1176. The station, in turn, could forbid the local cable television system from importing the program into its local broadcast area from a distant station. *Id.* Cable operators challenged the rule on First Amendment grounds, arguing that, by preventing them from transmitting a syndicated program into an area in which local broadcast station held exclusive presentation rights, the rule unconstitutionally restrained their speech. *Id.* at 1190. The D.C. Circuit disagreed, noting that while cable providers generally enjoy a statutory copyright license to retransmit television broadcasts, Congress and the FCC had provided that they did *not* have such a license where transmission would violate the syndicated exclusivity rule. *Id.* As the court explained, there simply is "no First Amendment right to . . . make commercial use of the copyrighted works of others." *Id.* at 1191.

As these decisions recognize, it is claims such as the one petitioners advance here – and not the compulsory copyright licenses under challenge – that ultimately threaten freedom of expression. To promote the progress of science and the

arts, Section 106 of the Copyright Act, 17 U.S.C. § 106, defines for copyright holders a set of *exclusive* rights. On occasion, Congress has concluded that the public interest would be better served by giving Section 106 less than its full scope, and has created compulsory licenses that allow others the right to make use of copyrighted works under certain conditions. Such conditions balance the rights of the copyright holder with the interests of others who wish to use the copyrighted material without obtaining permission. *E.g.*, 17 U.S.C. §§ 111(c)(1)-(3), 114(d)(2), (j)(13), 115(a). Following the reasoning of petitioners here, such provisions could be described as infringements upon the "editorial discretion" of the party wishing to use the copyrighted expression, in the sense that the user is less free to make use of the expression than if the conditions were not imposed. But the user has far more freedom than if the compulsory license had not been granted in the first place. Thus, the position petitioners advocate here would simply serve to strip Congress of the power to grant conditional copyright licenses. Such an argument misconceives the core purposes of copyright, and would have the perverse result of decreasing the amount of expression available for use by the public.

2. The Fourth Circuit decision does not conflict in any respect with the *Turner* decisions. To the contrary, the Fourth Circuit scrupulously followed those decisions.

a. The Fourth Circuit did not depart from the *Turner* decisions when it rejected petitioners' argument that SHVIA could be upheld only on the basis of a showing that satellite carriers possess monopoly power, and would use that power to compete unfairly against television broadcast stations. To

the contrary, in *Turner II* a majority of the Court rejected precisely what petitioners now claim the Court held. Justice Kennedy's opinion for four Members of the Court disavowed the proposition that the cable must-carry requirement "can only be justified as . . . a measure to protect broadcasters from . . . anticompetitive behavior." 520 U.S. at 194. There is, this Court explained, an independent interest in "preserving a multiplicity of broadcast outlets regardless of whether the conduct that threatens it is motivated by anticompetitive animus or rises to the level of an antitrust violation." *Id.* Justice Breyer's concurring opinion likewise concluded that the mandatory cable must-carry requirements could be upheld solely on the basis of Congress's interest in preserving a multiplicity of broadcasters. *Id.* at 225-26.

In any event, the issue of market dysfunction was relevant in the *Turner* decisions only because it provided the foundation for Congress's conclusion that cable systems would not carry large numbers of broadcasters voluntarily. *E.g.*, *id.* at 197 ("Evidence indicated the structure of the cable industry would give cable operators increasing ability and incentive to drop local broadcast stations from their systems, or reposition them to a less-viewed channel."); *id.* at 198 ("Congress concluded that vertical integration gives cable operators the incentive and ability to favor their affiliated programming services . . . Extensive testimony indicated that cable operators would have an incentive to drop local broadcasters and to favor affiliated programmers.") (internal quotation marks and citations omitted); *id.* at 200 ("In addition, evidence before Congress, supplemented on remand, indicated that cable systems would have incentives to drop local broadcasters in favor of other programmers less likely to compete with them for audience

and advertisers."). Here no such showing is necessary because petitioners specifically told Congress, and expressly alleged in their complaint in this case, that they would not carry most local broadcast stations if given a station-by-station compulsory license.

Moreover, it should be noted that the premise of petitioners' argument – that their decisions about what to carry are "governed solely by viewer demand," Pet. at 16 – is false. Indeed, there is a fundamental mismatch between viewer preferences and the basis on which satellite carriers make programming decisions. Because satellite programming is for the most part distributed on a nationwide basis, a satellite carrier's decision to carry a national programming service such as the Food Channel rather than a particular local broadcast station is based on the fact that *on a nationwide basis* that programming service is likely to attract a larger audience than that particular local broadcaster. But within the broadcaster's home market, it will, in almost all instances, be preferred by more viewers than will the nationwide programming service. *Turner II*, 520 U.S. at 206 (least watched local broadcaster is more popular than many cable programming services). Thus, in maximizing their profits nationwide, petitioners will not be reflecting the true viewing preferences of consumers.

b. The Fourth Circuit did not depart from the *Turner* decisions when it rejected petitioners' plea for strict scrutiny. To the contrary, the case for strict scrutiny here is far weaker than it was in *Turner*.

Petitioners' principal argument for strict scrutiny rests on a fallacious premise. As petitioners would have it, SHVIA's

carriage term is necessarily content-based because it "is on its face entirely dependent upon the *stations* the [satellite] operator has selected or will select," in that a satellite carrier's decision to carry one local broadcast station in a market will trigger the obligation to carry all others in that market. Pet. at 21-22 (internal quotation marks and citations omitted). As the Fourth Circuit recognized, however, "SHVIA's carriage obligations are not triggered *simply* by the decision to carry a local broadcast station in a given market. Instead, they are triggered by the decision to carry that station *by making use of the § 122 license*." Pet. App. 30a (emphasis in original). In other words, SHVIA's carriage provision applies only if a satellite carrier chooses to rely on SHVIA's royalty-free license to acquire the rights to retransmit a broadcaster's programming. If a satellite carrier obtains copyright permissions in the marketplace through some means other than the royalty-free license, it may carry – and exclude – whatever stations it chooses. Thus, the same broadcast station content will trigger SHVIA's carriage provision if the satellite carrier depends on the royalty-free license for the right to retransmit it, but not if the carrier secures the ability to carry that content in some other way, such as through individualized negotiations with the copyright holders. It is the carrier's decision to choose one economic arrangement (the royalty-free license) rather than another (negotiated permission) that triggers SHVIA. Indeed, it makes little sense to say that a satellite carrier's choice to carry a single broadcast station in a market (without securing copyright permission) triggers an obligation to carry other stations. That is not a choice carriers had before SHVIA, and it is not a choice SHVIA gives them.

Petitioners' claim that SHVIA is "materially indistinguishable" from the right-of-reply statute this Court held unconstitutional in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), also lacks force. In *Turner I*, this Court found *Tornillo* inapplicable for reasons that are equally true here: (1) the carriage requirement is not triggered by the expression of particular viewpoints, and carriage rights are not granted "on the ground that the content of broadcast programming will counterbalance the messages of [satellite] operators," 512 U.S. at 655; (2) the access provided to broadcasters will not "force [satellite] operators to alter their own messages to respond to the broadcast programming they are required to carry, *id.*; (3) there is "little risk that [satellite] viewers would assume that the broadcast stations carried on a [satellite] system convey ideas or messages endorsed by the [satellite] operator," *id.*; and (4) the provisions will not "cause a [satellite] operator to conclude that the safe course is to avoid controversy," *id.* at 656 (internal quotation marks and citations omitted). There is simply no inconsistency between *Tornillo* and the Fourth Circuit's decision in this case.[7]

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[7] Petitioners' assertion that they have no choice other than to submit to SHVIA's carriage term because they cannot, as a practical matter, "privately negotiat[e] the thousands of copyright clearances required for even a single day of programming," Pet. at 22, is irrelevant. The First Amendment would be implicated only if SHVIA withdrew a preexisting speech right; the Constitution does not require Congress to assist satellite carriers in obtaining the copyrighted works of others on terms the carriers would prefer. Even if a satellite carrier "does not have [the benefit] it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution does not confer an entitlement to such [benefit] as may be necessary to realize all the advantages of that freedom." *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 550 (1983) (internal quotation marks and citation omitted); *see also Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546-47 (1985) (holding

Nor is strict scrutiny warranted on the theory that SHVIA has the content-based purpose of promoting "major market independent broadcast stations" at the expense of "network affiliates in smaller markets." Pet. at 25. This Court made clear in *Turner II* that Congress's imposition of must-carry to protect less watched, more vulnerable stations was content-neutral even though popular network affiliates would have been carried voluntarily. 520 U.S. at 191-92 (noting that "Congress was under no illusion" that popular local television stations needed the protection of a must-carry requirement). In any event, petitioners have not even attempted to show that any such distinction is content-based. Such a proposition is by no means self-evident and, upon a cursory comparison of the programming of independent stations and network affiliates, appears implausible. Major network affiliates and their independent counterparts alike broadcast dramas, situation comedies, and feature films. In fact, they often offer identical programming, with network affiliates showing it first during primetime hours and less popular stations broadcasting it later in syndication. At most, petitioners have posited that SHVIA contains speaker-based preferences. But, as this Court indicated, "so long as they are not a subtle means of exercising a content preference, speaker distinctions of this nature are not presumed invalid under the First Amendment." *Turner I*, 512 U.S. at 45.

c. The Fourth Circuit did not depart from the *Turner* decisions in its application of intermediate scrutiny to SHVIA. Although petitioners make sweeping claims that the court of appeals "refused to apply the standard announced in

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that there is no right to the use of copyrighted works without the permission of the copyright owner).

Turner II, and fundamentally reworked this Court's intermediate scrutiny jurisprudence," Pet. at 26, their real complaint is exceedingly narrow. Petitioners do not dispute (nor could they, in view of the *Turner* decisions) that the core purposes of SHVIA – "to preserve free television for those not served by satellite or cable systems and to promote widespread dissemination of information from a multiplicity of sources," H.R. Conf. Rep. No. 106-464, at 101-02 – are important governmental interests unrelated to the suppression of free speech. *Turner II*, 520 U.S. at 189-90 (citing *Turner I*, 512 U.S. at 662). Nor do petitioners contend that SHVIA fails the narrow tailoring prong of intermediate scrutiny. Such an argument would be impossible to sustain in view of the fact that petitioners decide for themselves precisely how much of the alleged "burden" to assume under SHVIA's voluntary market-by-market license approach. *See also supra* page 9 (noting ways that Congress narrowed scope of SHVIA's carriage provision).

Petitioners' only argument is that Congress lacked a sufficient basis for concluding the important interests SHVIA is designed to serve would be threatened by noncarriage of local broadcast stations on satellite systems. Because satellite carriers serve only approximately 15% of viewers, petitioners contend, the potential audience loss is not sufficiently great to cause the kinds of severe adverse financial consequences that would follow if a broadcast station were excluded from a local cable system.

That argument misses the fundamental point. Congress knew, from its experience with the cable industry, that broadcast stations denied carriage on paid video

programming services would lose significant portions of their audience. Specifically, in the *Turner* cases, Congress found – and this Court confirmed – that stations denied carriage on cable systems would face a loss of viewership that would in turn result in a decline in its ability to attract advertising revenue and, ultimately, in the quality and diversity of its programming:

> Simply put, a television station's audience size directly translates into revenue – large audiences attract larger revenues, through the sale of advertising time. If a station is not carried on cable, and thereby loses a substantial portion of its audience, it will lose revenue. With less revenue, the station can not serve its community as well. The station will have less money to invest in equipment and programming. The attractiveness of its programming will lessen, as will its audience. Revenues will continue to decline, and the cycle will repeat.

Turner II, 520 U.S. at 208 (quoting congressional testimony).

For purposes of promoting the interests that both the Cable Act and SHVIA seek to protect, it does not matter whether that injury is inflicted as a result of exclusion from one monopoly supplier of paid video programming or from two or three suppliers who divide the market among them. Once the overall Congressional judgment to protect against this harm has been vindicated, Congress must have the power to guard against piecemeal destruction of that interest.

Moreover, Congress reasonably predicted that SHVIA would provide such a boost to satellite's popularity that its

market share – and the effect on broadcast stations of its refusal to carry them – would grow rapidly. The satellite carriers unequivocally indicated that they intended to compete with cable for subscribers. A royalty-free license, they argued, would help them do so. EchoStar's president, for example, testified that the satellite industry had lost as many as 40 million subscribers as a result of its failure to carry local broadcast stations. 2/4/99 Hrgs. at 4 (statement of Charles W. Ergen). Thus, Congress had every reason to believe that exclusion from satellite systems would, by itself, put large numbers of stations at risk of incurring substantial financial harm, and thereby serving their audiences significantly less well or not at all.

3. Review is also unwarranted because the Fourth Circuit's judgment can be sustained on an alternative ground. SHVIA is entirely voluntary. It neither compels nor restricts speech. SHVIA confers an optional benefit that petitioners are free to take or leave. To the extent it affects their speech opportunities, it expands those opportunities by giving satellite carriers copyright-free access to the expression of others that they previously could transmit only by incurring the burden and expense of securing permission to do so. Such a provision is simply not subject to the kind of First Amendment scrutiny – strict or intermediate – that petitioners urge.

A provision such as SHVIA, which confers benefits and imposes no restrictions, could run afoul of the First Amendment only if it were deemed to be an unconstitutional condition. But SHVIA imposes no unconstitutional condition because it does not require petitioners to surrender an "independent benefit" in order to obtain another

government good. *Taxation With Representation*, 461 U.S. at 545.

This Court has repeatedly held that conditions reasonably related to the benefit offered are permissible and that conditions that define that scope of a government benefit are by definition reasonably related to that benefit. *Id.*; *Rust v. Sullivan*, 500 U.S. 173, 197 (1991). When Congress chooses to grant a benefit, it is entitled to define the scope of that benefit. Thus, in *Rust*, this Court explained that the First Amendment poses no obstacle to Congress's decision to use selective grants "to encourage certain activities it believes to be in the public interest" without, at the same time, funding an alternative approach. 500 U.S. at 192-93 (upholding Congress's decision that programs receiving government grants could offer counseling about family planning but not about abortion). This Court has approved such benefit programs precisely because they do not interfere with a speaker's exercise of editorial discretion or, for that matter, any other protected activity.

The unconstitutional conditions doctrine does not apply to laws that confer benefits to be used only for predefined purposes. *See, e.g.*, *Rust*, 500 U.S. at 194; *Lyng v. International Union, United Automobile Workers*, 485 U.S. 360, 369 (1988); *Taxation With Representation*, 461 U.S. at 545; *Cammarano v. United States*, 358 U.S. 498, 513 (1959). SHVIA is precisely that sort of provision. It does not force petitioners to forgo any "protected conduct" to obtain its benefits. They remain free to acquire and use copyright permissions from the actual copyright holders for programming they wish to retransmit, and to retransmit only that programming. They also remain free to decline to carry

broadcast stations in any or all markets. The provision only helps define how the license Congress granted may be used. 47 U.S.C. § 338(a). In this case, as in *Rust*, "the Government is not denying a benefit to anyone, but is instead simply that [the licenses be used] for purposes for which they were authorized." 500 U.S. at 196.

Congress's decision to help satellite carriers retransmit the signals of all broadcast stations to subscribers in a particular market – but not giving them the added benefit of permission to retransmit the signals of only some broadcast stations – is simply a decision to encourage one activity without interfering in any way with alternative editorial choices. Petitioners' disappointment over the particular form of corporate welfare Congress decided to give them does not implicate the First Amendment and therefore is not subject to heightened scrutiny.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

THOMAS P. OLSON
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 633-6000

DONALD B. VERRILLI, JR.*
JESSIE K. LIU
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 663-6000

HENRY L. BAUMANN
BENJAMIN F.P. IVINS
NATIONAL ASSOCIATION OF
BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5300

Counsel for Respondents National Association of Broadcasters, Association of Local Television States, Inc., and The Univision Network Limited Partnership, and Univision Television Group, Inc.

ROBERT A. LONG JR.
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-6000

Counsel for the Associations of Public Television Stations, the Public Broadcasting Service, and the Corporation for Public Broadcasting

**Counsel of Record*